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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. **871**

PROGRESS DEVELOPMENT CORPORATION, *Petitioner*,

v.

DEERFIELD PARK DISTRICT, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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DEERFIELD PARK DISTRICT, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Progress Development Corporation, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The first opinion of the Supreme Court of Illinois, reported at 22 Ill. 2d 132, 174 N.E. 2d 850, is printed as Appendix A, pp. 28 to 36, *infra*. The opinion of the Circuit Court of Lake County, Illinois, on remand, is not reported,

but is printed in the record at pages 246-282. The second opinion of the Supreme Court of Illinois, review of which is here sought, is reported at 26 Ill. 2d 296, 186 N.E. 2d 360 and is printed as Appendix B, pp. 37 to 40, *infra*. The judgment of the Supreme Court of Illinois is printed as Appendix C, pp. 41 to 42, *infra*.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on November 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), petitioner having asserted below and urging here denial of rights secured by the Fourteenth Amendment to the Constitution.

QUESTIONS PRESENTED

(1) Was the Supreme Court of Illinois correct in holding that a showing of racial application of the eminent domain law is foreclosed whenever property being condemned is needed and suitable for parks?

(2) Is equal protection denied by a public condemnation achieved through the joint participation of public authorities and private citizens to maintain the all-white character of the community?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in part as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Eminent Domain Act of Illinois is found in Chapter 47 of the Illinois Revised Statutes.

STATEMENT

The Village of Deerfield is an all-white suburban municipality about twenty miles northwest of Chicago, with a

12,000 population (R. 10, 67, 149, 151-52, 165). Petitioner, Progress, came to Deerfield in early 1959, bought two separate sites for residential development and commenced construction with the full approval of the Village authorities (R. 68-69, 125-27).

On November 11, 1959, Deerfield first learned that Progress intended to sell homes to Negroes as well as whites (R. 84-85, 158, 200, 201, 254). Within hours construction was stopped by Village order (R. 129-130). Village protest meetings inflamed the community (R. 131-33, 139, 141-45, 158, 160-61, 166-69, 177, 183, 188-89, 194-95, 200, 208, 255-57). A racist citizens' group was formed to block the integrated housing plans (R. 256). On December 5 and 6, a Village-wide poll was taken on housing integration—eight to one against Progress (R. 142, 257-58).

On the following day, to satisfy the community demand that Progress be stopped, the Park Board took formal action to condemn both of Progress' residential developments (R. 258). A bond issue referendum for this purpose was passed December 21 (R. 247). On December 24, 1959 the Park Board filed petitions for condemnation (R. 1).

Over petitioner's constitutional objections (R. 4, 18, 31, 37), the Supreme Court of Illinois has upheld the condemnation solely on the ground that Deerfield needed parks and Progress' two sites were suitable for parks. The Court foreclosed any and all consideration of petitioner's evidence that the condemnation was occasioned by, was built upon, resulted in, and was achieved through, racial discrimination. We set forth below the undisputed sequence of events evidencing that discrimination.

What Happened in Deerfield Up To November 11, 1959

Petitioner is an Illinois corporation following a policy of building homes available for purchase by Negroes as well as whites. Max Weinrib, an officer of Progress, was

employed to acquire sites for residential development and to construct and sell homes thereon (R. 124). In his quest for sites, Weinrib went to Deerfield in February 1959 and noted large "For Sale" signs on a 15-acre tract called Floral Park and a 7-acre tract called Pear Tree, both unimproved pieces of real estate and separated by intervening properties (R. 68-69, 125-126). Weinrib promptly entered into negotiations for their purchase and bought the tracts on behalf of Progress (R. 125-126).

Weinrib secured a firm of engineers to prepare a subdivision plat of the Floral Park property, providing for 39 homesites. In order to secure the necessary Village approvals for the plat, Weinrib attended several meetings of the Board of Trustees and of the Deerfield Planning Commission (R. 126). The plat was approved by the Village Board of Trustees on July 8, 1959 (R. 69, 126) and a similar plat for 12 homesites at Pear Tree was approved by the Board of Trustees in August, 1959 (R. 69, 126).

Because Floral Park and Pear Tree are situated within School District No. 110, Weinrib also attended meetings of the School Board in connection with these plats (R. 127). At a meeting in April, 1959, Weinrib outlined Progress' proposed housing development at Floral Park, which is located across the street from the Wilmot School (R. 128). He described the number and kinds of houses to be built and a discussion ensued as to the estimated number of children who might attend school from these homes (R. 128). It was further reported at this meeting that Progress had agreed to contribute $350 to the School District for every home built in Floral Park, with the exception of two model homes. This contribution, made by agreement with the School District, was a condition to the approval of the plat by the Board of Trustees (R. 127). And on August 11, 1959, the School Board was informed that Progress planned to construct twelve houses on the Pear Tree property and that Progress would contribute to the

School District the sum of $350 for each of those homes (R. 80).

Thus, the approval of Progress' plans was discussed at all of these Village Board, Planning Commission and School Board meetings and no objections thereto were offered by anyone; nor did anyone state that either or both of these properties or any parts thereof would be used or needed for park purposes in the future (R. 127, 202). And while the Village Board, the Planning Commission and the School Board were all giving their affirmative blessing to Progress' plans, the Park Board disavowed any interest in these sites. As late as August, 1959, when the Park Board ran an unsuccessful referendum for a swimming pool and related park sites, it chose other sites to meet the park needs of the community.[1]

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[1] Like any other community, Deerfield has an admitted general need for more park land (R. 113), and this need was a subject of Park Board consideration. But during the year 1959, while the Park Board met many times prior to the November 11 integration news, there is no reference in any of the official minutes of the Board to either the Floral Park or Pear Tree properties (R. 72). Although the Park Board received a written report on May 19, 1959 from its planning consultant on the subject of possible swimming pool sites (R. 117), none of the three possible sites mentioned were either Floral Park or Pear Tree or close to either of them (R. 91-95). Roy Layman, the consultant who prepared this swimming pool report, testified that he had made an oral recommendation in May, 1959, for the acquisition of petitioner's sites, but Park Board members admitted that they had not considered them "for purchase" (R. 184-185, 192, 197). That neither site was being considered for purchase is confirmed by the fact that, when the Park Board ran a referendum for a swimming pool and other park sites in August, 1959, *none* of the money sought was to be used to acquire either Floral Park or Pear Tree, nor was any provision made in the referendum for the acquisition of either site (R. 81). In August 1959, and from then on till November 11, 1959, the Park Board showed no interest whatsoever in Floral Park or Pear Tree. Mr. Mitchell, President of the Park Board, was fully aware of the construction at Floral Park (R. 166) and he and the other Park Board members evidenced no interest in petitioner's sites for potential parks.

Following community approval of the Floral Park subdivision plat in July, Progress began construction work on the property. Water and sewer improvements were undertaken late in August and thereafter Progress was "in continuous process of construction" (R. 128). Building permits were obtained, following several changes and corrections in the plans at the behest of the building commissioner, who told Weinrib that, "if every builder would undertake to act in the same manner, they would have very few headaches when it came to construction in the village" (R. 128). On the basis of the permits issued in late September, construction was started on two model homes. Foundations were dug, footings were installed, and carpentry work was begun (R. 128-129). By November 11, 1959, the two homes were approximately in the stage of being "carpentry-roughed"—i.e., the roof was on, the partitions were going in, and the plumbing work had started (R. 129).

Such was the state of affairs in Deerfield generally and at Floral Park and Pear Tree in particular on the eve of November 11, 1959—a quiet, normal community in which a substantial residential project was under active construction with full community approval. The night of November 10 was like any other night in Deerfield—School Board No. 110 was meeting to discuss such things as handball facilities at the junior high school (R. 82). Then suddenly, on November 11, life in Deerfield took a dramatic and fearsome change. "The whole community was thrown into an uproar after November 11, 1959 when it became known to the officials and citizens of Deerfield that some of the houses that [Progress] proposed to build would be sold to Negroes and other non-Caucasians."[2]

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[2] *Progress Development Corp.* v. *Mitchell*, 182 F. Supp. 681, 705 (N.D. Ill. E.D.), rev'd 286 F.2d 222. This was the civil rights suit commenced by Progress against Deerfield authorities and certain private citizens. Trial has been postponed indefinitely pending resolution of the entire matter in the state proceedings of which review is here sought.

What Happened in Deerfield After November 11, 1959

On November 11, 1959, Deerfield first learned that Progress intended to sell some of its homes in Floral Park and Pear Tree to Negroes (R. 84-85, 158, 200, 201, 254). On the night of November 11 two Deerfield residents appeared at a meeting of the Village Board of Trustees and informed Joseph Koss, President of the Board of Trustees, "that Negroes might move into the proposed Floral Park and Pear Tree Subdivisions" (R. 158). Koss repeated the rumor to the other Board members immediately following the regular meeting that night (R. 158).

The Village Board of Trustees went into instant action. As Kross himself testified, "I believe Mr. Bowen, the village engineer in charge of building inspection, was absent from the meeting, and we decided Thomas Matthews, the village attorney, should talk to him rather than us" (R. 158). Matthews did his work effectively, for, when Weinrib arrived at Floral Park on November 13, he found that Village engineer Bowen had been there ahead of him and had stopped all construction (R. 129).[3]

Four days later, at a Park Board meeting on November 17, there was manifested a suddenly revived citizens' inter-

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[3] Weinrib arrived at the Floral Park job site about noon on November 13th and found the workers preparing to leave. The carpenters advised him that Building Commissioner Bowen and an inspector had stopped the job and refused to permit any further work to proceed (R. 129). On inquiry to the building commissioner as to the reason for the stoppage, Weinrib was advised that two carpentry violations as to one house and the absence of "stamped" plans at the site of the second house had led to the stop order (R. 130). The plans as to the second house were also declared to be no longer acceptable without corrections (R. 130). A second stop order was issued on December 19, purportedly based on the absence of a spot survey of the two houses (a requirement not previously imposed) (R. 130). And a third stop order was issued on December 21, 1959, purportedly based on improper location of the front eaves of the two houses, although these eaves were exactly as shown on the original plans approved by the Building Commissioner (R. 130-131).

est in parks for Deerfield.[4] Among the citizens who addressed the Board on the need for parks was Joseph Powell, head of a local group known as the Deerfield Citizens Committee. Powell stated "there was a need for parks in Deerfield, the population growth of Deerfield was continuing, and there was a need for more parks" (R. 194-95). Powell told the Board that his Committee had started to prepare a report on the acquisition of parks in the spring of 1959 and, if the Board wished, the Committee "would be glad to complete that report" (R. 149). Dudley Dewey, who had been on the Park Board for 4½ years, testified he had never seen Mr. Powell prior to this November 17 meeting (R. 188-189). Nevertheless, the Park Board adjourned until December 7 to await the proferred citizens' report (R. 195, 255).

The next night, November 18, the Village Board of Trustees met in the Village Hall with a large crowd present (R. 144). The Village Manager read an official statement from the Village Board of Trustees stating "that the people of the community are gravely concerned" over the Progress development "on a so-called integrated basis." "The people are demanding," said the statement, "that action be taken to maintain their property values and the social fabric of the Village" (R. 200). In addition, "there was a lot of conversation by others about the proposed subdivisions" (R. 144). After the formal meeting adjourned, the crowd remained and a public discussion took place concerning the Progress project (R. 255). An unidentified woman stated that a petition would be circulated "to stop the Progress subdivision from becoming a reality" (R. 144).

Another meeting of the Village Trustees took place on November 23 in the Village Hall before an overflow crowd, with police stationed in the corridors and reporters and

[4] As noted above, see p. 5, *supra*, only three months earlier a park referendum had been turned down by the community (R. 81).

TV cameramen present (R. 131, 145, 160-161, 166-168, 255). Among those attending the meeting was one Harold Lewis, who had indicated his intent to organize a group "to assist the Village Board to prevent the integrated subdivision" (R. 167). The entire meeting was devoted to Progress' plans for racially integrated housing in Deerfield (R. 132). Joseph Koss, the Village Board President, chaired the meeting (R. 132).

During a temporary adjournment of this meeting, while the Board members held a private caucus, Harold Lewis spoke to the assembled public. He "stated that the procedures and acts of Progress Development Corporation were un-American; that a way could be found to prevent this development from proceeding, and that if the people kept their heads a way could be found to do this" (R. 133; and see R. 145, 167, 255-256). He also spoke of Progress "being a Communist scheme or some type of totalitarian scheme, a group who tried to sneak into Deerfield and cram this idea of integration down the people's throats" (R. 167). An announcement was made that petitions protesting Progress' plans were being circulated (R. 168).

After the meeting adjourned, about 500 people went across the street to the American Legion Hall for another meeting (R. 135, 168, 256). Carl Bagge stated that he and other attorneys had joined Lewis "to assist the board in doing something about the integrated subdivision"; he said that he was sorry that the last bond-issue referendum had been defeated, but he felt that "opinion in Deerfield had changed and it might be possible now to get the referendum passed; that he was aware that they were trying to avoid their social responsibility, that a terrific price had to be paid when people avoided their social responsibility, that he was willing to pay his price and he thought the audience was" (R. 168). A five-minute standing ovation greeted Bagge's speech (R. 168).

Thus was first brought to public view the community's plan for solving the twelve-day old racial integration issue by condemning the Progress properties and obtaining the necessary public support for the bond issue. The first step, taken that very night, was the formation of the openly racist North Shore Residents Association to combat Progress' plans (R. 256).

Another crowded public meeting was held the next night, November 24, at the Deerfield Grammar School. Mr. Koss, the Village Board President, again presided. He said the Village Board of Trustees "had straightened things out," and that "they would withhold what they had decided until some time later" (R. 169). As a member of the North Shore Residents Association later admitted to a reporter, "it had been pretty generally decided with the Village Board that since the Village Board had already approved the subdivision, and there seemed to be no flaw in their approval, there wasn't much they could do so the issue would be turned over to the Park Board to do something about it" (R. 170).

A few days later a number of members of the North Shore Residents Association met at the home of John Jursich (R. 141). At this meeting plans were made for raising funds and placing newspaper advertisements. Such an advertisement appeared in the Deerfield Review on December 3, 1959 (R. 202-209). This ad referred to the Floral Park Subdivision as "a racially integrated housing project" (R. 202) that was "detrimental to the Village of Deerfield and its residents" (R. 203). The advertisement further stated that the Association's Legal Committee had conducted "an extensive study of law on the matter and effective plans have been devised" (R. 206). It concluded with this statement: "The vast majority of the people of Deerfield are certain that they are morally right in resisting this thing. And they are convinced a small group of

outside developers, no matter how lofty their claimed objectives, cannot master legal technicalities to compel 16,000 Deerfield residents to submit to their dictates" (R. 209).

A second meeting took place in the Jursich home on December 3, 1959, attended by James Mitchell, the President of the Park Board, by Harold Lewis, the chairman of the North Shore Residents Association, and several other members of the Association (R. 139, 141, 257). Lewis testified that there was discussion about possible action by the Park Board and the possibility of a bond-issue referendum (R. 141-142). Mr. Robert Mullen, a member of the Residents Association present at Jursich's, testified (R. 139): "There was much concern that condemnation acquire park sites."

On December 5 and 6, the North Shore Residents Association conducted a poll of Deerfield residents to see how many favored or opposed an integrated housing development at Floral Park (R. 142, 257-258). During the taking of the poll, members of the Association were heard to describe the Floral Park plans as a "Communist scheme" (R. 171). The result of the poll was eight to one against Progress—3500 opposed, 400 in favor, and some 50 without opinion (R. 258).

On December 6, following the poll, Park Board Members James Mitchell and Edward Walchli met at Joseph Powell's home to receive the latter's report from the Deerfield Citizens Committee regarding over-all park plans (R. 183). On December 7 the Park Board had a "rather short meeting" (R. 191); it took formal action to condemn Floral Park and Pear Tree and authorized offers of purchase to Progress (R. 258). The formal resolutions and minutes documenting this action had been prepared prior to the meeting (R. 163-164). The meeting was succinctly described by Board member Dewey: "We read the report of the Citizens Committee. Mr. Mitchell presented it and

then we voted on the referendum . . ." (R. 191).[5] The bond-issue referendum was scheduled for December 21 (R. 88). Park Board President Mitchell testified that his "personal feeling was that there were apparently a number of people that wanted to work to sell a bond issue, and it would be perhaps the ideal time to run a referendum" (R. 157).[6]

The Park Board meeting was only the first of three attended by Mr. Mitchell on the evening of December 7. He rushed from the Park Board to a meeting of School Board No. 109 (R. 164, 185). There Mitchell asked the School Board if it would be willing to "accept" money from the Park Board in obtaining sites that the School Board desired (R. 185-186). Mitchell remembered sitting down next to a Mrs. Lourie at the School Board meeting and her

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[5] As Mitchell himself later conceded, "there was nothing contained in that report of the citizens committee which gave us information which we didn't know on November 17, 1959" (R. 157). An additional and obviously more significant reason for continuing the November 17 meeting of the Park Board to December 7 was given by its Secretary. When a reporter asked the Secretary of the Park Board as to the reasons for adjourning the November 17 meeting to December 7, the Secretary stated "that they had adjourned from November 17 to a later date in order to get a reply back on this balloting that had been done by the North Shore Residents Association" (R. 171). When asked if the date had been definitely set for December 7, the Secretary replied, "yes, it had but they had an understanding that if the answers were not back on the balloting they would meet and adjourn until they did have the answers back on the balloting" (R. 171-172).

[6] In contrast to Mitchell's suggestion that Christmas was "the ideal time to run a referendum" for a swimming pool on the North Shore of Lake Michigan, in his earlier testimony concerning the August referendum that "we figured that the month of August would be a good time to sell it, including a municipal swimming pool, because of the heat" (R. 154). Significantly, too, Mitchell conceded they had "never before held a bond issue just before Christmas" and that he had "never heard of any public body doing so just prior to Christmas . . ." (R. 163).

saying, "Oh, come on, Jim, you know the reason you want this bond issue passed is because of this integration situation, isn't it, Jim" (R. 164). Mitchell does not "remember replying" (R. 164).

Following this second meeting, Park Board Members Mitchell and Walchli met again with Harold Lewis and other members of the Residents Association at the Jursich home. The Park Board's offers of purchase were there turned over to certain members of the Residents Association to deliver to Progress (R. 137, 162, 258).

With the scheduling of the referendum for December 21, the Residents Association swung into high gear. At a public meeting on December 15, Chairman Harold Lewis admitted that "it really was the color of the Negroes which was one of the basic issues" disturbing the Park Board and the Residents Association (R. 172). And on December 16, 1959, Lewis, again acting in his role as Chairman of the Residents Association, addressed a letter to the Association of Citizens Councils at Greenwood, Mississippi, expressing appreciation for the material sent to him concerning "the problem of integration" (R. 210-211). The letter further stated that the citizens of Deerfield have "thus far remained united and determined to resist at any cost." Support from the White Citizens Councils was solicited in Deerfield's fight against the "conspiracy to deceive its government and residents." About the same time that Lewis was pleading with the White Citizens Councils for help, he prepared, printed and distributed throughout Deerfield (R. 143) a leaflet entitled "The Massive Wallop!" Decrying "Communist and extreme left-wing elements" in "all phases of our daily life," the Massive Wallop attacked the Chief Justice and the school desegregation decision as a "threat to representative government" and "judicial

usurpation of legislative power," and on this basis urged defeat of integration in Deerfield (R. 215-219).

The result of the December 21 referendum was a foregone conclusion. The voters approved the bond issue by a two-to-one margin (R. 247). All the principals in the cast listened to the election results that night at Park Board Chairman Mitchell's house—Powell was there and so were Lewis and the others (R. 191). They could indeed be gratified by their work—no Negroes were coming to Deerfield.

Three days later, December 24, the Park District commenced this condemnation proceeding in the Illinois state courts. More than three years later, after two appeals to the highest court of the State, petitioner is still awaiting judicial consideration of the constitutionally relevant facts just recited. For the Supreme Court of Illinois has twice ruled that, if the condemned properties are needed and suitable for parks, constitutional inquiry into the discriminatory application of the eminent domain law is wholly foreclosed. What the Supreme Court of Illinois has overlooked is the fact that need and suitability for parks is the *beginning* not the end of the matter under the Fourteenth Amendment; its ruling presents profound and significant constitutional issues for this Court's review.[7]

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[7] The instant case has been the subject of a perceptive book, Harry and David Rosen, *But Not Next Door* (1962), and has been summarized in the 1961 United States Commission on Civil Rights Report No. 4, *Housing*, pp. 132-134. See also Weisbord, *Homes Without Hate*, The Progressive, January 1961, pp. 28-32. Note might be taken, too, of the statement of Mrs. Franklin D. Roosevelt after she had sought to mediate the Deerfield controversy: "The issues in Deerfield have to be faced across the land. Deerfield is the Little Rock of housing." See *New York Times*, Dec. 1, 1962.

REASON FOR GRANTING THE WRIT

THE SUPREME COURT OF ILLINOIS HAS DECIDED A FEDERAL QUESTION OF NATIONAL SIGNIFICANCE IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT

The Issue Raised by This Case is One of National Significance

As efforts have been made to provide equal opportunity in housing, local governments have devised a variety of schemes under color of law to close the door. While racial zoning laws have been outlawed (*Buchanan* v. *Warley*, 245 U.S. 60) and restrictive covenants held unenforceable (*Shelley* v. *Kraemer*, 334 U.S. 1, *Barrows* v. *Jackson*, 346 U.S. 249), local authorities have frequently devised methods "more subtle, motives less discernible, and exclusions more effective."[8] "Local government agencies have played an important part in excluding minorities from many areas, particularly in the suburbs. Zoning powers, building codes, control over sewers and other utilities, and other governmental prerogatives have been used."[9] Areas designed for integrated or minority group housing have been subjected to sudden zoning reclassifications, increased tax assessments, master planning changes, larger lot size requirements, increased curb and sidewalk requirements, delays in subdivision approvals, refusals and delays in road or sewer extensions, and dilatory and harassing building inspection actions.[10] Nor are these "more subtle" methods limited to any particular region of the country—the issue raised by

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[8] Abrams, *Forbidden Neighbors*, 210 (1955).

[9] Grier, *Discrimination in Housing*, 19 (1960).

[10] Cf. 1961 United States Commission on Civil Rights Report No. 4, *Housing*, 132-138.

this case is national in scope, affecting the North equally with the South.

One of the most effective anti-integration devices has been the use of the eminent domain power—the power utilized in the present case—for driving out and preventing the development of integrated housing.[11] The "public" purposes for which such developments can be condemned are infinite—parks, swimming pools, schools, roads, airports, libraries, public buildings, air raid shelters, and the like. In an area where a host of governmental powers are available to frustrate integrated housing, courts must be vigilant against discriminatory governmental action with such far-reaching effects.

Indeed, judicial tolerance of discrimination in housing would be in sharp contrast to the recent action of the Federal Government setting a national policy against discrimination in housing. Executive Order No. 11063, November 20, 1962, 27 Fed. Reg. 11527. The decision below encourages the very discrimination the Executive branch of the Government has now interdicted. It will avail little for the President to order that all federally-assisted housing be on a non-discriminatory basis if suburban all-white communities can bar open-occupancy builders through the devices mentioned above. Our avowed national policy of

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[11] See, e.g., *Wiley* v. *Richland Water District*, Civil No. 60-207 (D. C. Ore., 1960), 5 *Race Rel. L. Rep.* 788, where a water district sought to utilize the power of eminent domain to prevent the building of a residence for Negroes. See also *Western Springs Park District* v. *Falls*, No. 52 C 14741 (June 9, 1953), a decision by the Circuit Court of Cook County, Illinois; there the court found that an otherwise lawful condemnation for park purposes of a lot purchased by a Negro couple, was the result of the park district's purpose to keep the couple out of an all-white community. Such action was found to be an abuse of the condemnation power. See also *City of Creve Coeur* v. *Weinstein*, 329 S.W. 2d 399 (Mo.). There a Negro couple unsuccessfully sought to resist a municipal condemnation suit to turn the house they were building into a playground and park.

fair housing practices depends for its success on judicial nullification of eminent domain abuses and other state and local devices which will otherwise be available against the non-discriminatory builders the Executive Order seeks to encourage.

Thus, the validation by the Supreme Court of Illinois of a racially-tainted condemnation presents a nationally significant question all apart from the constitutional principle upon which it validated the tainted condemnation. But review has been rendered doubly necessary by the fact that, in validating Deerfield's racial abuse of eminent domain, the Supreme Court of Illinois applied a standard which opens the gates wide to the easiest kind of evasion of constitutional obligations under the Fourteenth Amendment. By ruling that community need for parks and the suitability of the land taken for that purpose forecloses all further constitutional scrutiny, the Court has given the go ahead signal to local authorities of all varieties to find devices for circumventing the Fourteenth Amendment. The standard adopted by the court below, to which we now turn, sweeps aside this Court's significant authorities requiring judicial scrutiny sufficiently discerning to preclude all forms of state support for racial discrimination.

The Holding of the Supreme Court of Illinois That Need and Suitability for Parks Validates a Taking of Land Irrespective of Racial Considerations is in Direct Conflict With the Decisions of This Court

The opinions of the court below are clear. On the first appeal, from the order of the Circuit Court of Lake County summarily condemning the property (R. 57-62), the Supreme Court of Illinois decided that a hearing was necessary before the Circuit Court solely to determine what it described as "the material questions of fact," namely, "whether or not Deerfield needed park sites; whether or not Progress's property is suitable for park sites; and whether

or not these sites will be devoted to public use" (p. 34, *infra*). The Court went on to say that, "if parks are needed in Deerfield, and if the land so selected for them is appropriate for that purpose, the power of eminent domain cannot be made to depend upon the peculiar social, racial, religious, or political predilections of either the condemning authority or the affected property owner" (p. 35, *infra*). The Court therefore remanded the case "for the sole purpose of permitting Progress a full hearing on the question of whether this taking is necessary and for a public purpose" (R. 64).

On the second appeal, this time after need and suitability for parks was demonstrated and in fact conceded, the Supreme Court of Illinois repeated its ruling that this was all there was to the case. It closed its eyes to the admitted facts recited above, saying, "The evidence clearly shows parks are needed in Deerfield and that the land condemned is appropriate for that purpose. Progress has had a full hearing and opportunity to refute this proof and did not. The decision of the trial judge was correct" (p. 40, *infra*).

This holding that need and suitability is the end of the search misconceives the nature and the thrust of the Equal Protection Clause of the Fourteenth Amendment. Evidence as to the need for parks and appropriateness of the condemned land for park purposes relates only to the legality or illegality of the action from the standpoint of Illinois eminent domain law. But the Equal Protection Clause is not concerned with such matters. The legality or illegality of official action in light of state law "can neither add to nor subtract from its constitutional validity", since a "mere violation of a state statute does not infringe the federal Constitution." *Snowden* v. *Hughes*, 321 U.S. 1, 11. What *is* the concern of the Equal Protection Clause is a knowingly unequal application of state law, discriminating against those who are entitled to be treated equally.

With the foregoing area of proof in mind, judicial in-

quiry must be concerned with the possibility of a knowingly unequal discrimination in the terms or application of state law. And if it be clear that the exercise of such a fundamental power as condemnation comes within the four corners of the eminent domain statute, that consideration but opens the constitutional inquiry. *Need and suitability are the beginning not the end of the matter under the Fourteenth Amendment.* For it has long been obvious that a seemingly proper exercise of such power—proper, that is, in terms of the relevant state statute—may entail forbidden encroachment upon individual freedom guaranteed by the Fourteenth Amendment. See *Bates* v. *Little Rock*, 361 U.S. 516, 524-525. "For a State may not, under the guise of prohibiting professional misconduct [or of eminent domain], ignore constitutional rights." *NAACP* v. *Button*, 371 U.S. 415, 439.

Simply put, the decision of the Court below cannot stand because need for parks and ultimate use as parks can be present in the face of obvious violations of the Equal Protection Clause. Suppose, for example, Progress had purchased 20 properties scattered all over Deerfield for integrated housing and the Park Board had condemned all 20, leaving the intermediate properties wholly untouched. Assuming there were a general need for park land and these sites would be utilized as parks, no one could rationally contend that a court would be foreclosed from inquiry into an apparent knowing discrimination. Surrounding circumstances may demonstrate, as they so obviously do here, that one or two governmental takings are as racially tainted as 20. cf. *McFarland* v. *American Sugar Refining Co.*, 241 U.S. 79, 86-87.

Indeed, the decision below does not even leave room for judicial discernment of an Equal Protection violation in circumstances where Park Board authorities overtly concede that they are racially motivated in exercising the condemnation power. Suppose, for example, that Park

Board members had explicitly stated that Floral Park and Pear Tree, although needed and suitable for parks, were not nearly the best places in town for parks, and were chosen because this would keep Negroes out of Deerfield. Under the holding of the Supreme Court of Illinois, even this admitted and patently illegal discrimination would be immune from scrutiny.

The unduly restrictive standard of Fourteenth Amendment inquiry employed by the Supreme Court of Illinois in this case disregards the profound constitutional strictures of this Court. In cases involving racial discrimination, this Court has steadfastly and continuously required judicial inquiry sufficiently broad and sensitive in its scope to reach discrimination however it may be effectuated. Such cases have been subjected by this Court to "the most rigid scrutiny" (*Korematsu* v. *United States*, 323 U.S. 214, 216) so as to discern both ingenuous and ingenious forms of discrimination (see *Guinn* v. *United States*, 238 U.S. 347, 364; *Cooper* v. *Aaron*, 358 U.S. 1, 17; *Gomillion* v. *Lightfoot*, 364 U.S. 339).

Moreover, the standard applied by the Supreme Court of Illinois is not merely inadequate to discern discriminatory purposes. It also bypasses significant rulings of this Court in racial cases wherein the existence of a presumptively legitimate governmental purpose did not foreclose but rather created the need for a constitutional adjudication. Thus in *NAACP* v. *Alabama*, 357 U.S. 449, *Bates* v. *Little Rock*, 361 U.S. 516, and in *NAACP* v. *Button*, 371 U.S. 415, the states urged the existence of legitimate and traditional state purpose in the areas of foreign corporate registration, taxation, and limitation of litigation. In each case, however, this Court found constitutional violation, notwithstanding the asserted state interest. In like vein, this Court found violations of equal protection, notwithstanding the existence of presumptively legitimate state purpose, in *Shelley* v. *Kraemer*, 334 U.S. 1, *Terry* v. *Adams*, 345 U.S. 461, *Pennsylvania* v. *Board of Trusts*, 353 U.S.

230, *Gomillion* v. *Lightfoot*, 364 U.S. 339, and *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715. See also *Steele* v. *Louisville & Nashville RR Co.*, 323 U.S. 192. In these cases, the states asserted "neutral" operation of otherwise unassailable state functions—judicial enforcement of property covenants, maintenance of a political primary system, public encouragement of education, defining city limits and licensing of restaurant facilities at public premises. Yet in each case, though the state's "purpose" may have been presumptively beneficial, its conduct was found to encourage and support racial discrimination and thus held subject to constitutional prohibition.[12]

All of the foregoing considerations are foreclosed by the ruling of the Illinois Supreme Court in the sensitive area of housing segregation. That Deerfield was and remains an all-white community, that continuing segregation has been the predicate of the governmental supportive action, is all foreclosed from judicial consideration by the ruling below. The back door to community segregation through exercise of public powers such as eminent domain has thus been opened wide. We submit that there is accordingly pre-

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[12] This is precisely the point at which the Supreme Court of Illinois was led into error. The Court blandly announced that "the condemnation of land for park purposes, is a legitimate and laudable municipal function" (p. 35, *infra*). In closing its eyes to anything beyond this laudable function, it failed to follow the rationale of this Court's decisions in the cases cited in the body. And its error is compounded by its effort to distinguish *Gomillion* on the ground that there "the inescapable illegal purpose [was found] from the act itself" (p. 35, *infra*). For nothing in the Fourteenth Amendment or this Court's decisions has ever suggested that discrimination must appear on the face of the act itself.

Put another way, the error of the Supreme Court of Illinois can be seen from its statement in its first opinion (p. 36, *infra*) limiting petitioner to a showing "that the land sought to be taken, is sought not for a necessary public purpose, but rather for the sole purpose of preventing Progress from conducting a lawful business." But under the cases cited in the text, it is not the duty of one claiming a denial of equal protection to negative the existence of any vital state purpose.

sented for this Court, in a significant and sensitive area of national concern, a case compelling of review.

The Undisputed Record Herein Demonstrates an Overwhelming Case of Constitutional Infringement

We believe that this Court will want to review a ruling which, in the important area of housing, serves as an open invitation to community segregation through the use of eminent domain authority insulated from judicial safeguards. This is particularly so in view of the strength and clarity of the demonstration of a constitutional infringement in Deerfield, Illinois. And here it appears undeniable that the parks which are to replace petitioner's integrated housing projects, were *occasioned by, were built upon, resulted in, and were achieved through, racial discrimination.* Condemnation was occasioned by the November 11th news that Progress intended to construct an integrated housing project. Condemnation was made possible by the Deerfield authorities building upon and utilizing the racial antagonisms of the community. The impact and the effect of the condemnation action were clearly discriminatory. And finally, the obvious purpose and actions of the citizenry of Deerfield to discriminate against Progress and the Negroes whom it would one day serve, were totally interwoven with the action of the Village authorities. Whether considered jointly or separately, these circumstances infected the condemnation at issue with unconstitutional racial discrimination.

The sequence of events from November 11 to December 24 leaves no slightest doubt that, but for the November 11th news concerning Negroes, petitioner's property would never have been subjected to this condemnation action: (1) the integration news spread like wildfire; (2) within thirty-six hours the public authorities stopped all petitioner's construction; (3) repeated Village protest meetings culminated in citizen demand for condemnation; (4) the

Park Board took steps leading toward condemnation; (5) the openly racist Residents Association, enlisted by the Park Board, took a community poll showing overwhelming hostility to Negro residents at Floral Park; (6) the following day the Park Board voted to acquire the land and to hold a referendum; (7) the Residents Association delivered the Park Board's offer of purchase to Progress; (8) the citizens voted at the referendum to finance the taking of the land; (9) the Park Board immediately instituted this condemnation action.

In every sense the proposal for public parks at petitioner's housing sites was wholly dependent upon and created from the community's hostility toward Negro occupancy. The joint participation between the various public authorities of the community and the private citizens overtly bent upon preventing desegregation, was continuous and intimate from the first moment that the news broke until the final step in the public taking. *Joint participation existed at every stage:* when the Village authorities on the evening of November 11 set the wheels in motion for an immediate stop order on construction; when a statement of the Village Board of Trustees, read at a Village meeting, gave official expression to the feeling that integration would affect "property values"; when the hastily formed and openly racist Residents Association and its leader attended and dominated the various community meetings; when the day after the Residents Association public poll showed an 8 to 1 sentiment against integration, the Park Board summarily exercised its condemnation power and ordered a referendum; when the Park Board turned over the legal offers to purchase the sites to the Residents Association for delivery to petitioner; when the Residents Association appealed to the community on racial grounds to adopt the referendum; when the public officials and the racists met at the Park Board President's home on the evening of the vote to hear the election returns and reap

the benefits of their cooperation. What we have here is a "common undertaking" which the state trial court expressly recognized (R. 280) — an undertaking between public officials, private citizens and the total community of Deerfield, to resist Negro occupancy by exercise of the power of eminent domain.

It is not now necessary to determine which of this Court's previous authorities most clearly applies to the constitutional violation here so forcefully demonstrated.[13] Certainly, discrimination was here effected under "color of law"; the public officials of the community were active and knowing participants in the process leading to public condemnation which preserved continuing segregation in Deerfield. And while it is clear that the public authorities had the discriminatory purpose revealed by their conduct,[14] this Court need not reach that issue to find a constitutional violation on the present record. For the Court has made clear in a line of rulings that the guarantee of equal protection may be transgressed by governmental conduct falling far short

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[13] Indeed, we are not unmindful of this Court's observation in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722, that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'this Court has never attempted' ", because "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

[14] In the light of their knowing exploitation of racial considerations, the Park Board members cannot be heard to say that they were motivated solely by a desire "to acquire needed park lots for all of Deerfield" and were "not opposed to integration" (R. 278-279). The overt facts speak louder than self-serving declarations of motive. ". . . mere assertions of public officials that there has not been discrimination will not suffice." *Reece* v. *Georgia*, 350 U.S. 85, 88. Such assertions cannot be accepted as a refutation of a discriminatory situation evident from overt facts; otherwise equal protection "would be but a vain and illusory requirement." *Norris* v. *Alabama*, 294 U.S. 587, 598. See also *Hernandez* v. *Texas*, 347 U.S. 475, 481-482; *Eubanks* v. *Louisiana*, 356 U.S. 584, 587.

of a demonstrated governmental purpose to discriminate. Certainly, no one could have imputed such purpose to the public authorities in *Terry* v. *Adams*, *Shelley* v. *Kraemer*, *Pennsylvania* v. *Board of Trusts*, *Burton* v. *Wilmington Parking Authority*, and similar cases. It is not because government is racially motivated that the Fourteenth Amendment is transgressed in such instances. Rather, in the words of the *Burton* ruling, the controlling consideration is that the Constitution is transgressed when "to some significant extent the State in any of its manifestations has been found to have become involved" with racial discrimination. See also *United States* v. *McElveen*, 180 F. Supp. 10, 14 (E. D. La.) affirmed, 362 U.S. 58.[15]

Certainly too, the governmental involvement and interplay with racial discrimination and racial discriminators were in this case more continuous, intimate and necessary to the maintenance of segregation, than in any of the aforementioned adjudications of this Court. The governmental action in issue was not merely supportive of racial discrimination; it was the indispensable prerequisite to achieving the community purpose of preventing Negro occupancy in Deerfield.[16]

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[15] "The action of the defendant Registrar in giving effect to the mass challenges of the individual defendants achieved a discriminatory result in violation of his duties under the 15th Amendment. Whether or not he had the racially discriminatory purpose which motivated the action of the individual defendants and the defendant Citizens Council is irrelevant as a matter of law." The United States in its brief before this Court, echoed the view of the District Judge, pointing out that the intent of the public officer is irrelevant and "what matters is the fact of discrimination through state conduct," because the "touchstones" of state action in such cases are the elements of "acquiescence, recognition and enforcement by the state of essentially private discrimination" (at pp. 16, 26-27).

[16] This consideration invokes also the lines of constitutional authority precluding foul means to achieve public ends. It is a fundamental tenet of our Constitution that governmental objectives may be achieved only by

In sum, the decision of the Supreme Court of Illinois not merely espouses a clearly erroneous and nationally dangerous standard of judicial review under the Fourteenth Amendment; it does so in a case involving the clearest kinds of state involvement with, support to and enforcement of, racial discrimination. The clarity of the equal protection violation must therefore be added as a reason for review to the dangerously inadequate standard of constitutional scrutiny adopted by the court below in an area of vital national signficance.

CONCLUSION

It is respectfully submitted that the condemnation approved by the Supreme Court of Illinois fails to afford that protection to Negro Americans which is contemplated by the Fourteenth Amendment. All that has been "protected" in Deerfield is its continuing viability as an all-white community. When such protection derives from the

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fair and orderly process. Under the Fourteenth Amendment the existence of a valid objective of governmental action does not itself validate whatever means are used to achieve the governmental objective, nor permit the use of means which violate specific constitutional prohibitions. Thus, governmental action, whether legislative or executive, which has a presumptively valid objective, nevertheless falls if the means toward the achievement of the goal violate the guarantees of liberty, equality, or procedural due process. Even if, therefore, it were assumed for sake of argument that a governmental condemnation is not tainted by any racial purpose of the officials who undertake it, yet if the means for its achievement is official resort to racial animosity, the action must fall under the Fourteenth Amendment. In this respect, the guarantees of equal protection and procedural due process coalesce. "The concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling* v. *Sharpe*, 347 U.S. 497, 499. And see *Griffin* v. *Illinois*, 351 U.S. 12, 17, where this Court ruled that "due process and equal protection both call for procedures . . . which allow no invidious discriminations. . . ."

public act of condemnation, brought about by a common undertaking of public authority and private citizenry, this Court cannot remain aloof.

For the foregoing reasons, it is submitted that the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

DEERFIELD PARK DISTRICT, APPELLEE, v. PROGRESS DEVELOPMENT CORPORATION ET AL., APPELLANTS.

(April 26, 1961)

Mr. JUSTICE SOLFISBURG delivered the opinion of the court:

This is an appeal from a judgment of the trial court in consolidated condemnation cases on June 28, 1960, ordering that title to certain real estate vest in the petitioner, the Deerfield Park District, (hereinafter called Park District), upon their depositing the sum of $168,500 with the county treasurer of Lake County. By this appeal, defendants, Progress Development Corporation and Chicago National Bank, as trustee, (hereinafter referred to jointly as Progress), seek to set aside the judgment and overrule the motion of the Park District to strike portions of defendants' traverse or motion to dismiss. No question is raised as to the amount of just compensation for the land taken which was stipulated in the trial court.

Stripped of the epithetical rhetoric of the parties the sole question before this court is the scope and extent of the issues which may properly be submitted to the trial court in a condemnation proceeding. However, a decision of this question necessitates a review of the proceedings both in the trial court and Federal courts, together with the prior history of this controversy.

Beginning in April, 1959, and subsequent thereto, Progress acquired for residential development two unimproved tracts of real estate in the village of Deerfield, Lake County, Illinois. One tract of approximately fifteen acres became known as Floral Park Subdivision and the other tract of approximately seven acres, as Pear Tree Subdivision.

On July 8, 1959, the plat of Floral Park Subdivision

was duly approved by the Deerfield village board. This plat was properly recorded on July 31, 1959, and provided for 39 residential lots. Thereafter, Progress commenced the installation of water, sewer and street improvements and the construction of two model homes with village board approval.

On September 16, 1959, the plat of Pear Tree Subdivision was approved by the Deerfield village board and was recorded on September 18, 1959. This plat provided for twelve home sites.

On December 7, 1959, the Deerfield Park Board took formal action to designate Floral Park and Pear Tree subdivisions as park sites and ordered that they be acquired by condemnation proceedings for park purposes. Plaintiffs rejected an offer of the Park Board to purchase these subdivisions for $166,199.91. In the same meeting the Park Board, by proper resolutions, provided for a referendum to be held on December 21, 1959, for the purpose of submitting to the voters of Deerfield a $550,000 bond issue, $175,000 of which was designated for the purchase of the two subdivisions owned by Progress. The remainder of the bond issue was to cover the acquisition of four other park sites of approximately 58 acres, making a total of approximately 80 acres in the six tracts.

On December 21, 1959, the bond issue referendum was held. The election carried, and the bond issue was approved by the voters.

The following day Progress, and their parent corporation, Modern Community Developers, Inc., instituted suit in the United States District Court against the Park District, the village of Deerfield, and their respective boards, together with other individuals. The complaint alleged a conspiracy to deprive plantiffs of their civil rights, and sought to enjoin the Park District from condemning the land; the village from unlawful enforcement of their build-

ing code; and further sought damages against all defendants. *Progress Development Corporation* v. *Mitchell*, 182 F. Supp. 681.

At the same time Progress and Modern sought a temporary restraining order from the United States District Court against the Park Board and the village trustees. The order was granted as to the village trustees but denied as to the Park Board. Two days later, on December 24, 1959, the Park District filed the present condemnation petition.

By agreement the condemnation proceedings were held in abeyance until hearings in the United States District Court were concluded.

On March 4, 1960, the United States District Court denied injunctive relief and dismissed the complaint of Progress and Modern and granted summary judgment thereon and they appealed.

Thereafter on March 11, 1960, Progress filed a motion to dismiss the condemnation petition on five grounds:

1. That a prior action is pending between the petitioner and one of the defendants in the United States District Court invoiving the same subject matter.

2. That the filing of the condemnation petition is an overt act in a conspiracy to deprive Progress of its civil rights.

3. That there is no *bona fide* public need for acquisition of this property for public use.

4. That petitioner did not negotiate or bargain in good faith.

5. That the acts of the petitioner in conspiracy with others are abuses of the power of eminent domain.

In support of the motion, Progress attached a copy of their complaint in the United States District Court. The same day the Park District moved to strike grounds 1, 2, and 5 of the motion to dismiss and filed an answer to grounds 3 and 4. The trial court granted the motion to

strike grounds 1, 2 and 5 and, finding grounds 3 and 4 constituted a traverse of the petition to condemn, set the same for hearing.

Upon the hearing the Park District introduced evidence of its resolutions designating these areas as necessary park sites and authorizing their acquisition. They further proved offers to purchase and their refusal. Progress then submitted a 50-paragraph request for admission of facts which appears to have been treated below as an offer of proof. Objections thereto were sustained.

The gist of the rejected offer of proof is that Progress follows a policy of building homes for sale to Negroes and white persons; a policy first revealed to the general public on November 11, 1959. Prior to July, 1959, there were "For Sale" signs on the property; and the Park District did not contact the owner. The Park District and the local school board had many meetings with regard to school and park and swimming pool sites prior to November 11, 1959, but no discussion was had or acquisition attempted in relation to Floral Park or Pear Tree, until the public disclosure of the controlled occupancy policy of Progress.

Progress offered no further proof, and the parties stipulated as to the fair market value of the premises, and the order of condemnation was entered.

During the pendency of this appeal, the United States Court of Appeals for the Seventh Circuit, affirmed the orders of the district court denying plaintiffs' motion for a preliminary injunction; but reversed the orders and judgment dismissing the complaint and granting summary judgment thereon. The cause was remanded for a trial on the merits. The court also denied a motion for mandatory injunctive relief. *Progress Development Corporation* v. *Mitchell*, Doc. 12976, January 4, 1961, ———— Fed. 2d————.

On this appeal, Progress insists that they have been

denied a right to a hearing in the trial court on their charges that the present condemnation proceeding is a part of a conspiracy to deprive Progress of their civil rights.

The Park District, however, maintains that the issues of conspiracy and a denial of civil rights can only be adjudicated in the forum of Progress's choice, the Federal courts; and that the Park District sufficiently proved below the necessity for condemnation.

It is conceded, as it must be, that every private owner of property holds his title subject to the lawful exercise of the sovereign power of eminent domain, and courts may not substitute their judgment for that of the condemning authority in inquiring into the necessity and propriety of the exercise of the power. *School Trustees* v. *Sherman Heights Corp.* 20 Ill.2d 357; *County Board of School Trustees* v. *Batchelder*, 7 Ill.2d 178.

Nevertheless the power of eminent domain, great as it is, is subject to constitutional limitations, and the courts may interpose their authority to prevent a clear abuse of the exercise of that right. *Department of Public Works and Buildings* v. *Lewis*, 411 Ill. 242; *City of Chicago* v. *Vaccarro*, 408 Ill. 587; *Tedens* v. *Sanitary District of Chicago*, 149 Ill. 87.

It is also well settled that State power cannot be used as an instrument to deprive any person of a right protected by the Federal constitution. *Gomillion* v. *Lightfoot*, 362 U.S. 916, 5 L. ed. 2d 110; *Shelley* v. *Kraemer*, 334 U.S. 1, 92 L. ed. 1161; *Aaron* v. *Cooper*, 358 U.S. 3, L. ed. 2d 1.

If, therefore, the Park District's attempted exercise of the power of eminent domain would deprive Progress of equal protection of the law, it is the duty of the Illinois courts to prevent it. We do not think the resort of Progress to the Federal forum absolves the tribunals of this State from the duty of protecting their rights.

The present status of the Federal proceedings merely de-

termines that Progress has failed to show sufficient ground for the issuance of a temporary Federal writ to stay the Illinois condemnation proceeding. There is at this time no final adjudication of the question of law regarding Progress's purported defense to condemnation.

The time was ripe to determine the validity of the defense in the trial court, and it was of necessity so determined by the judgment order.

The issues before us therefore narrow to two questions. (1) Did the stricken counts of the motion to dismiss contain allegations of fact which if proved would constitute a defense to the petition? (2) Did the offer of proof upon the traverse constitute a good defense?

We have carefully examined the motion to dismiss and the district court complaint which apparently is incorporated therein by reference. Viewed together they are replete with unsupported conclusions and voluminous allegations of fact which appear to be completely immaterial to any issue in this case. However, we think that the 42-page complaint contains allegations sufficient to charge the Park District with using its power of eminent domain for "the sole and exclusive purpose" of preventing the sale of homes by Progress to Negroes in violation of Progress's right to equal protection of the law.

We consider such a charge, if proved, to be a denial of the necessary prerequisites to condemnation of necessity and public use, and therefore a defense to the petition.

This conclusion, however, does not mean that all, or even a substantial part of the matters alleged by Progress are material to this inquiry. We think it of no importance that the citizens of Deerfield, and even a member of the Park District board were opposed to the policy of controlled occupancy adopted by Progress. Nor is the fact that steps to acquire this land were not taken prior to Progress's announcement of its policies material here.

The material questions of fact are whether or not Deerfield needed park sites; whether or not Progress's property is suitable for park sites; and whether or not these sites will be devoted to public use. On these issues the Park District has made a *prima facie* case. *School Trustees* v. *Sherman Heights Corp.* 20 Ill.2d 357.

It then became incumbent upon Progress to rebut the *prima facie* case by material evidence. Progress, however, seems to argue that the facts which they have offered to prove would sufficiently rebut the Park District case. In this contention they rely on the recent case of *Gomillion* v. *Lightfoot,* 362 U.S. 916, 5 L. ed. 2d 110. As we have noted before, the teaching of that case is relevant here, but we think the facts are inapposite. The *Gomillion* case involved a suit for declaratory judgment by several Negroes claiming that Local Act 140 of the Alabama legislature was invalid on the ground that it deprived them of certain constitutional rights. Act 140 redefined the territorial limits of the city of Tuskegee, converting its shape from square to an "uncouth twenty-eight sided figure." All but four or five of approximately 400 qualified Negro voters were thereby excluded from the municipality while none of approximately 600 white voters were removed.

The United States Supreme Court, in striking down the redistricting, said:

"These allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

"The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve."

In the case at bar, the faction protested—the condemnation of land for park purposes, is a legitimate and laudable municipal function. The designation of Progress's land as a park site and its acquisition, standing alone, contains no such irresistible mathematical demonstration of illegal purpose as contained in the Alabama legislation.

In *Gomillion*, the United States Supreme Court did not engage in any metaphysical investigation into the motives of the legislators. They found the inescapable illegal purpose from the act itself. From an examination of the record in the case at bar, it is apparent that many of the allegations of Progress are framed for the purpose of directing a judicial inquiry into the motives of the individual members of the Park District Board, rather than into the actual purpose for which this land is sought. This is clearly an inappropriate area for judicial inquiry. (*Detroit United Railway* v. *City of Detroit*, 255 U.S. 171, 178, 65 L. ed. 570; *Soon Hing* v. *Crowley*, 113 U.S. 703, 710-711, 28 L. ed. 1145; *Sinclair Refining Co.* v. *City of Chicago*, (7th cir.) 178 F.2d 214, 217.) As we stated in *Ligare* v. *City of Chicago*, 139 Ill. 46, in a condemnation case the purpose for which the power of eminent domain is exercised may be questioned, but "the motives that may have actuated those in authority are not the subject of judicial investigation."

We cannot see how the rule could be otherwise. If parks are needed in Deerfield, and if the land so selected for them is appropriate for that purpose, the power of eminent domain cannot be made to depend upon the peculiar social, racial, religious or political predilections of either the condemning authority or the affected property owner. Progress is entitled to the same opportunity to hold land and

operate a business as anyone else. They, like all others, hold their land subject to the lawful exercise of the power of eminent domain. They like all others are entitled to show, in a condemnation proceeding, that the land sought to be taken, is sought not for a necessary public purpose, but rather for the sole purpose of preventing Progress from conducting a lawful business. *Cf. Progress Development Corporation* v. *Mitchell,* (7th cir.) Doc. 12976, folio 19, 286 F.2d 222.

In the light of these observations, we must consider the record below. We think that any proper proof on the issue of the right of condemnation could have been presented on the pleadings before the trial court on the hearing on the traverse. If by the trial court's ruling, it was intented to strike the allegation and deprive Progress of the right to prove by material facts that the exercise of eminent domain in the instant case was not necessary, and was not to be devoted to a public use, but was for the sole purpose of depriving Progress of the right to do business, then the ruling was in error. We have carefully examined the record, and while we feel that Progress's offer of proof was in poor form, and to large degree immaterial, the colloquy in the trial court, and the briefs and argument before us indicate a restriction on the right of Progress to prove a lack of necessity and public purpose. From the record as a whole we feel that justice will be served in reversing the judgment of the trial court and remanding the cause for the sole purpose of permitting Progress a full hearing on the question of whether this taking is necessary and for a public purpose.

Reversed and remanded, with directions.

APPENDIX B

DEERFIELD PARK DISTRICT, APPELLEE, v. PROGRESS DEVELOPMENT CORPORATION *et al*, APPELLANTS

(November 30, 1962)

MR. JUSTICE HERSHEY delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of Lake County in a condemnation proceeding ordering that title to certain real estate vest in the petitioner, the Deerfield Park District, in confirmance of a prior order and denying the motion of Progress Development Corporation to dismiss the condemnation suit. The appeal is taken directly to this court under section 12 of the Eminent Domain Act, Ill. Rev. Stat. 1961, chap. 47, par. 12.

This is the second time this case has been before us on appeal. On the prior appeal this court remanded the cause to the trial court for the sole purpose of permitting Progress a full hearing on the question of whether the taking was necessary and for a public purpose, 22 Ill. 2d 132.

The opinion in the prior appeal sets forth the facts in detail, and only a brief statement of them need be made here. In April 1959, and subsequent, Progress Development Corporation, a private corporation, acquired for residential development two unimproved parcels of real estate in the village of Deerfield, Illinois. One tract of approximately 15 acres was known as Floral Park, and the other tract, of approximately 7 acres, as Pear Tree. These subdivisions were platted and Progress commenced installation of water, sewer and street improvements and the construction of two homes in Floral Park Subdivision. Thereafter, the plat of Pear Tree Subdivision was approved. On December 7, 1959, the Deerfield Park Board ordered the condemnation of these two areas for park purposes. Appelants rejected an offer of the Park Board to purchase these subdivisions for $166,199.91. A referendum was held Decem-

ber 21, 1959, on a $550,000 bond issue to purchase these two tracts and four other park sites. The election carried. The following day, Progress and others sought a temporary restraining order in the United States District Court against the Park District, the village of Deerfield, their respective boards, and others, contending a conspiracy existed among those defendants to deprive plaintiffs in that action of their civil rights and seeking to enjoin the Park District from condemning the land and for other relief. The temporary restraining order was denied as to the Park Board.

Two days later this condemnation suit was filed. Progress filed a motion to dismiss the condemnation petition. The court granted the motion of the Park District to strike parts of the motion to dismiss and held a hearing on the grounds of the motion that there was no *bona fide* public need for acquisition of this property for public use and that petitioner did not negotiate or bargain in good faith. The proof offered by Progress was a 50-paragraph request for admission of facts which was objected to and which the court rejected.

This court remanded the cause on the prior appeal due to the restrictions on proof placed upon appellants in the trial court. We there held that "If by the trial court's ruling, it was intended to strike the allegation [that the Park District used its power of eminent domain for the sole and exclusive purpose of preventing the sale of homes by Progress to Negroes in violation of Progress's right to equal protection of the law] and deprive Progress of the right to prove by material facts that the exercise of eminent domain in the instant case was not necessary, and was not to be devoted to a public use, but was for the sole purpose of depriving Progress of the right to do business, then the ruling was in error." 22 Ill.2d 132 at 141.

On remand, the question was whether the taking was necessary and for a public purpose. As we stated in the

prior opinion, it is conceded, as it must be, that every private owner of property holds his title subject to the lawful exercise of the sovereign power of eminent domain, and the courts may not substitute their judgment for that of the condemning authorities in inquiring into the necessity and propriety of the exercise of the power.

On retrial the Park District introduced testimony of a professional park planner, of the park commissioners, and resolutions of the Park Board. This testimony clearly established that the taking is necessary for park purposes. The park planner testified he was employed to and did make a survey of the park district to determine suitable property for park purposes and that he made a report to the Park Board recommending acquiring these two sites before Progress had acquired any land. Floral Park was shown to be some 15 acres, fairly level, somewhat wooded, an excellent site to serve the population area, and is located across from the Wilmot School. Likewise, the Pear Tree Subdivision will serve a need for providing a park upon which a swimming pool can be located, as there is no swimming pool in the entire park District, which includes the entire community of Deerfield. It was shown these were the only available sites where vacant land could be obtained for park purposes in the western one-third of the Park District.

Four park commissioners testified in detail as to the proper location of the properties, the need for park development to provide better physical play area, football, baseball, apparatus, and for the general normal functions of the Park District, as well as to provide a swimming pool.

No attempt was made by Progress to contradict, vary or minimize the testimony on behalf of the Park District showing the taking was necessary and for a public purpose. In this state of the record, the Park District has sufficiently shown the need and necessity for the land in

question for public parks. These are the matters for which the previous remand was made and the facts have been sufficiently proved. As we stated in our prior opinion (p. 140): "the motives that may have actuated those in authority are not the subject of judicial investigation."

Nevertheless, we must say in passing that Progress has had a full hearing, and as trial judge said, "with the evidence door thus opened to its widest point," there is no evidence that any member of the Park Board formed or engaged in any conspiracy to deprive Progress of any of its legal rights. No violation of the fourteenth amendment to the constitution of the United States is here involved.

As was said by this court in the prior opinion (p. 140): "If parks are needed in Deerfield, and if the land so selected for them is appropriate for that purpose, the power of eminent domain cannot be made to depend upon the peculiar social, racial, religious or political predilections of either the condemning authority or the affected property owner. Progress is entitled to the same opportunity to hold land and operate a business as anyone else. They, like all others, hold their land subject to the lawful exercise of the power of eminent domain."

The evidence clearly shows parks are needed in Deerfield and that the land condemned is appropriate for that purpose. Progress has had a full hearing and opportunity to refute this proof and did not. The decision of the trial judge was correct.

Judgment affirmed.

APPENDIX C

UNITED STATES OF AMERICA

STATE OF ILLINOIS
SUPREME COURT } ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the twelfth day of November in the year of our Lord, one thousand nine hundred and sixty-two, within and for the State of Illinois.

Present:

Roy J. Solfisburg, Jr., Chief Justice
Justice Joseph E. Daily
Justice Harry B. Hershey
Justice Byron O. House
Justice Walter V. Schaefer
Justice Ray I. Klingbiel
Justice Robert C. Underwood
William G. Clark, Attorney General
Robert G. Miley, Marshal

Attest:

Mrs. Earle Benjamin Searey, Clerk

BE IT REMEMBERED, that to-wit: on the 30th day of November, 1962, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Deerfield Park District Lake County, Illinois, a body crporate and politic, *Appellee,* vs. Progress Development Corporation, an Illinois corporation, et al., *Appellants.*	Appeal from Circuit Court, Lake County. 71780.

No. 37100

And now, on this day, this cause having been argued by

counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the judgment of the Circuit Court of Lake County aforesaid, Be Affirmed in all things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellants costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.